Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

Andreas Plonka
Petitioner

V.

Richard Brown, Donald Laraway, Steve Clark, Karen Sastra, Frank Schaeffer,Ronald Decker, Gerald Kramer, Andrew Skrobanski, Dean Edwards, Lawrence Brown, Robert Gouldin and Micheal Getman.

Respondents

On Petition For Writ of Certiorari
U.S. Court of Appeals for the 2nd Circuit
40 Foley Square New York, N.Y. 10007

Petition For Writ Of Certiorari

Mr. Andreas Plonka
Rue du Brou 35
Verviers, Belgium 4800
Tel. 0113287300282

Questions Presented For Review

How can the cloak of immunity shield those individuals who abuse their authority to achieve personal goals?

How can absolute immunity apply to a town justice who continues to participate in proceedings he has recused himself from?

How can absolute immunity apply to a town justice of a two justice court who knows of a wrong doing by her fellow justice but does nothing to stop it?

How can absolute immunity apply to a town justice of a two justice court who did not recuse herself immediately after her fellow justice became a complainant in a criminal matter before her court?

How can a town justice be afforded absolute immunity for coercive behavior and lack of professional competence?

When the cloak of immunity shields acts done maliciously or corruptly, how can the justice system call itself just?

Should ethnic hatred of a defendant be shielded by prosecutorial immunity, when basically that is the reason for the prosecution of the defendant?

Should criminal defense attorneys be shielded from malpractice lawsuits, even when their client can prove that his attorney deliberately misled him in concert with the court; which was made up of individuals who were friends and neighbors who did not like the defendant and shared the common goal of hurting the defendant regardless of guilt or innocence?

Should qualified immunity shield police officers who deliberately violate the civil rights of an arrestee?

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42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or ommision taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declatory decree was violated or declatory relief was unavailable. For the purposes of this section, Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Absolute Judicial Immunity

For it is a general principle of the highest importance to the proper administration of justicee that a judicial officer, in excercising the authority vested in him, shall be free to act upon his own convictions; without apprehension of personal consequences to himself. Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are alleged to have been done maliciously or corruptly. A judges absolute immunity is overcome in only two sets of circumstances 1. a judge is not immune from liability for non-judicial actions ex. actions not taken in the judge's judicial capacity. 2. a judge is not immune for actions though judicial in nature, taken in complete absence of all jurisdiction. If a judge acts in clear absence of jurisdiction, she will not lose her immunity, however, unless she knew or must have known of the jurisdictional defect.

Pages 1,2,3,5 and 7

Qualified Immunity

The qualified immunity defense is intended to strike a fair balance between 1. the need to provide a realistic avenue for vindication of constitutional guarantees, and 2. the need to protect public officials who are required to excercise their discretion and the related public interest in encouraging the vigorous excercise of official authority. The qualified immunity doctrine protects government officials from civil liability in the performance of discretionary functions, as long as their actions could reasonably been thought consistent with the rights they are alleged to have violated. Qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law.

Pages 1,2 and 7

Standards of Administrative Policies Chapter C.
Rules of The Chief Administrator of The Courts
§ 100.3
D. Disciplinary responsibilities
1. a judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation shall take appropriate action.
E. Disqualification
1. a judge shall disqualify himself or herself in a proceeding in which the judges impartiality might reasonably be questioned, including but not limited to instances where: (a)(1) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentially facts concerning the proceeding. (c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding.

U.S. Constitution Amendment Eight

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment be inflicted.

Petitioner Andreas Plonka filed suit Pro Se pursuant to 42 U.S.C. 1983 in the U.S. District Court for the Northern District of N.Y; against the 12 named opponents on March 10, 2000; relating to incidents that occurred in Otsego and Delaware counties from 1994-1999.

By decision and order of the Hon. T. J. McAvoy dated July 15, 2002 the court dismissed all claims relating to events prior to March 10,1997 as statute of limitations barred suit. By decision and order dated November 27, 2002, the same court dismissed the complaint as to opponents Laraway, Schaeffer, Kramer, Skrobanski,L. Brown and Getman.

The actions of these opponents for which the petitioner had complained had taken place prior to March 10, 1997 and therefore petitioner was barred from suit against these individuals. In the decision and order of the Hon. T.J. McAvoy dated July 2, 2003, he orders the case to be dismissed against the six remaining defendants.

The reason for dismissal of the complaint as it pertained to town justices Clark, Sastra and Decker was on the basis of absolute judicial immunity. The dismissal as it pertained to A.D.A. R. brown was on the basis of absolute prosecutorial immunity.

The reason for the dismissal of the complaint as it pertained to State Trooper Edwards was on the basis of qualified immunity. The complaint asit pertained to Attorney Gouldin was dismissal for lack of evidence to support the petitioner's claim of malpractice.

The petitioner was in absolute disagreement with this decision; for had the Hon. McAvoy studied the evidence given to his court from the time of the petitioner's original filing in March of 2000 up until July 2003,theHon. McAvoy would have come to realize that the entire criminal case

brought against the the petitioner in the Unadilla Justice court (later transferred to the Otego Town Court) and the Village of Sidney court, was nothing but a small town conspiracy in rural upstate New York; in which the 12 opponents in the action acted in concert to"run the petitioner

and his family out of town" for reasons of ethnic hatred and fear. For which the petitioner feels that when a situation like this arises, that absolute immunity, prosecutorial immunity and qualified immunity and immunity from legal malpractice should not apply; if the evidence supplied is strong enough to warrant a change in the justice system.

The petitioner with all of this in mind appealed the July 2, 2003 decision and order of the Hon. McAvoy. In the decision and order dated September 2, 2004 the Hon. Ellsworth van Graafeiland, the Hon. Dennis Jacobs and the Hon. Rosemary S. Pooler of the U.S. Court of Appeals for the Second Circuit affirmed

the decision of the Hon. McAvoy dated July 2, 2003. The petitioner now files this petition for he believes that the Second Circuit Court of Appeals made the same mistake as the U.S. District Court did; by not considering and weighing the evidence supplied, carefully enough; and without apprehension of making a change in our justice system.

This change would serve to avoid the enormous flow of the same type of suit being filed by thousands of people in the U.S. who shared the same or similar experience as the petitioner has.

It is no secret to the petitioner, that one becomes town justice in Otsego County and Delaware County to manipulate laws and the rules of court procedure. Although they must know it is unethical. However, when a defendant stands before them that they have apersonal dislike of or feel he should not be welcome in the neighborhood; they feel free to abuse their authority and discretionary power.

Knowing all the while that, their activities will go on uncontrolled. Even when they catch someone's attention (defendant's) they will continue as the doctrine of absolute immunity will shield them.For the police offficers who abuse their authority, qualified immunity will shield them.

The criminal defense attorneys in these rural areas also love to"ride in on the coat tails" of corrupt judges and police officers; to their monetary advantage and sometimes promotions to assisant D.A. or District Attorney.The petitioner has spent four years(3-10-00 - 9-2-04) in court because of these reasons and has had enough!

The remaining six opponents in this action until 9-2-04, were guilty of the actions complained of by the petitioner. It is up to this court to give justice its proper meaning.

The cloak of immunity must be pierced in the case of petitioner's opponent Steve Clark.

Throughout the entire action, the U.S.D.C. and the 2nd Cir. Crt. ignored the fact that Clark became a complainant against the petitioner on 3-4-96; but had continued his activity in the case. On 10-1-97 at a hearing in this case at the Unadilla court, which had been arranged by the petitioner's attorney(at that time) Marcel LaJoy; Clark told LaJoy that because he was a complainant in the case he had excused himself from hearing anything in it.

Yet, he remained at the hearing. The fact is, Clark remained active in the case of the People of The State of New York v. Andreas Plonka all the way up until his disqualification on March 22, 1999. Clark was responsible for the setting of the petitioner's bail on 3-17-99 at $150,000.00 cash or $300,000.00 bond (misdemeanor offense), by his ever so conspicuous telephone call to town justice Decker of the Otego Town court.

The petitioner has recently received more material in regard to the duties of judicial office(NY CLS Standards and Admin Pol.) and the contents of the material support the petitioner's claim against Clark. According to this material, Karen Sastra should have recused herself immediately after Clark became a complainant (3-4-96) against the petitioner.

She did not; and also continued her activity in the case.She should not have presided over the 10-1-97 hearing and most certainly not have presided over the 3-22-99 bail reduction hearing.

In which, she had issued and signed an order of protection on behalf of Steve cark and family; against the petitioner which was dated 3-22-99 until 6-16-99. Yet, after all of this evidence of clear absence of jurisdiction on the parts of both Clark and Sastra was brought to the attention of both the U.S.D.C. and 2nd Cir. Crt. App.; both courts granted the forementioned opponents absolute immunity.

According to NY CLS Standards and Administrative Policies 100.3 Disciplinary responsibilities(1), both Clark and Sastra were in violation thereof by not reporting the other to the disciplinary board. But, the reason for this is quite obvious, both Clark and Sastra were acting in concert against the petitioner.

Therefore, the petitioner strongly believes that the decisions of both forementioned courts should be overturned.In the case of opponent town justice Ronald Decker, both of the forementioned courts granted him absolute immunity; which the petitioner believes should be overturned for the following reasons.

According to official court documents and a sworn deposition by D. A. William J. Gibbons dated 4-2-99, the charge of criminal contempt 2nd on Dec. 10,1994 was never brought against the petitioner; which was what the petitioner had been relaying to both justice courts(Unadilla & Otego).

Yet, on May 27,1999, before Decker in the Otego Town Court, the petitioner was coerced into pleading guilty to this charge and forced thereafter to pay a fine of $1000.00. By accepting Clark's phone call on March 17,1999 and applying the amount of bail dictated to him by Clark upon the petitioner

($150,000.00 cash or $300,000.00 bond); Decker was aware of Clark's participation in the case where Clark was in clear absence of jurisdiction. Also, by doing so Decker violated the petitioner's 8th amendment right of not being imposed upon by excessive bail. $150,000.00 cash or $300,000.00 bond is beyond description for a misdemeanor offense!

This led to the petitioner spending 5 days in the Otsego County Correctional Facility. Having the petitioner spend time in jail was the personal goal of Clark; and on 3-17-99 his friend Decker used his judicial authority to make it possible, activities such as these should not be shielded by absolute immunity.

On May 27,1999, Decker did commit other acts which were done deliberately to destroy the petitioner morally and financially and to see the petitioner deported. Decker did not warn the petitioner that a guilty plea before his court could lead to the petitioner loosing his permanent residency status in the U.S. .

Decker also did not inform the petitioner on that same day, that petitoner had the right to appeal the criminal conviction within 10 days thereof.

These acts were committed in concert with Clark, Sastra and R. Brown; who all shared the common goal of destroying the petitioner. These actions were also shielded by absolute immunity. the petitioner strongly believes that this decision should be overturned.

In the case of opponent A.D.A. R. Brown, both the U.S:D:C: and the 2nd Cir. Crt App granted him prosecutorial immunity. The petitioner strongly believes that these decisions shopuld be overturned; as Browm was aware of all of the actions of the forementioned opponents; and as A.D.A. did nothing to stop them.

The reason why he did nothing to stop them was because he too was acting in concert with them in order to destroy the petitioner for personal reasons. The petitoner complained of the act of slander on the part of Brown; for his statinmg that the petitioner was a NAZI.

This statement was made before Mr. D. K. Taylor attorney for the petitioner at that time, the petitoner's spouse and a friend of the family. Yet, both of the forementioned courts granted Brown immunity for this. The petitoner asks, how can ethnic hatred be protected? For the forementioned reasons, the petitoner strongly believes that the decisions of these courts should be overturned.

Petitioner's opponent Edwards was given qualified immunity for his deliberate violation of the petitioner's civil rights; by not giving him Miranda Warning upon his arrest of the petitioner.

Even though the petitoner supplied both the U.S.D.C. and the 2nd Cir. Crt App with enough evidence to prove it was deliberate. Edwards himself stated before several witnesses, " I will take him there (meaning jail) this is personal"! Personal? asks the petitioner all along, how? Petitioner does not know this man personally and had certainly done nothing to insult him.

The petitioner strongly believes that the qualified immunity decision of the forementioned courts should be overturned. Police behavior such as this should not be protected over and over. In the case of petitoner's opponent Atty. Gouldin; he got away with all of his misdeeds because the N.Y.S. Court of Appeals held that a plaintiff fails to state a cause of action in a legal malpractice action if the determination of guilt of the underlying criminal offense remains unchanged.

Carmel v. Lunney, 70 NY 2d 169, 511 NE 2d 1126, 518 NYS 2d 605 (1987). However, in the petitoner's case he had been mislead by Gouldin and the Otego Town Court (Decker) into believing he did not posess the right to appeal. When the petitioner found out that he did posess the right of appeal, he enforced it but the appeal was denied by the Otsego County Court as being untimely filed.

Because of Gouldin coercing the petitioner to plead guilty in concert with the all of the forementioned opponents; the petioner was arrested on 6-29-99 by U.S. Immigration and Naturalizationn at Albany, New York; and deportation proceedings were brought against him.

The proceedings were terminated on Dec. 2, 1999 before Judge M.A. Rocco at U.S. Immigration at Buffalo, New York. All of the forementioned actions of the petitoner's opponents caused the loss of petitioner's business, loss of income, loss of future earnings, mental anguish and shame for the loss of petitioner's good name as he now has a criminal record.

It seems according to the U.S.D.C. and the 2nd Cir. Crt App, that the petitioner must live with his loss and shame because those with authority and a title can do what they want because immunity or some other doctrine or clause will make it right.

The petitoner says, not only on his behalf but on behalf of all others like himself, "NO MORE!" This must stop! The decisions of these courts must be overturned and the petitioner must be allowed to go forward against his opponents and win back what is rightfully his.

For all of the reasons stated within this petition, the petitioner prays for certiorari to be granted.

Mr. Andreas Plonka Pro Se Petitioner

Andreas Plonka

Dated: November 16, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

This summary order will not be published in the Federal Reporter and may not be cited as a Precedential Authority to this or any other court, but may be called to the attention of this or any other court in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.

As a stated term of the United States Court of Appeals for the Second circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of September 2004.

Present: Hon. Ellsworth Van Graafeiland,
Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler
Circuit Judges

Andreas Plonka,
Plaintiff-Appellant,

-v-

Richard Brown, Donald Laraway, Steve Clark, Karen Sastra, Frank Schaeffer, Ronald Decker, Gerald Kramer, Andrew Skrobanski, Dean R. Edwards, Lawrence L. Brown, Robert Gouldin, Micheal Getman.
Defendants-Appellees
----------X

Appearing For Appellant: On Submission (Andreas Plonka, pro se, on the brief)

Appearing For Appellee Decker : On Submission (Alison M. Pavlakos, Napiersky Vandenburgh & Napiersky, LLP, Albany, N. Y. on the brief)

Appearing For Appellees Clark and Sastra: On Submission (Thiomas K. Murphy, Catherine A. Barber, Murühy, Burns, Barber & Murphy, LLP, Albany, N.Y. on the brief)

Appearing For Appellees Brown and Getman: On Submission (James E. Konstanty, Oneonta, N.Y. on the brief)

Appearing For Appellee Gouldin: On Submission (David M. Gouldin, Levene Gouldin & Thompson, LLP, Binghamton, N.Y., on the brief)

Appearing For Appellee Edwards: On Submission (Eliot Spitzer, Attorney General for The State of New York, Nancy A. Spiegel, Senior Asssistant Solicitor General, and Dorothy E. Hill, Assistant Solicitor General, on the brief)

Appeal from the United States District Court for the Northern District of New York (McAvoy, J.).

Upon due consideration, it is hereby ordered that the judgment of the district court is affirmed.

Andreas Plonka appeals from a decision and order of the United States District Court for The Northern District of New York (McAvoy, J.), entered on July 2, 2003, dismissing his complaint against all defendants. Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues.

Appellant fails to state a claim of slander against appellee Brown because he alleges neither special damages nor slander per se. See Aronson v. Wiersma, 65 N.Y. 2d 592, 594 (1985) (a statement that does not-on its face, defame plaintiff in her trade business or profession.. does not constitute slander per se, actionable withouit proof of special damages.) We affirm the dismissal of the claims against the remaining defendants for substantially the reasons stated by the District Court.

For the reasons set forth above, the judgment of the district court is hereby affirmed.

FOR THE COURT
ROSEANN B. MACKECHNIE, CLERK
BY:
"s/ Lucille Carr "
Lucille Carr, Deputy Clerk

United States District Court
Northern District of New York

Andreas Plonka,

Plaintiff

against

Richard Brown, Donald Laraway, Steve Clark, Karen Sastra, Frank Schaeffer, Ronald Decker, Gerald Kramer,Andrew Skrobanski, Dean R. Edwards, Lawrence L. Brown, Robert Gouldin, Micheal Getman

Defendants

Decision & Order

McAvoy, D.J.

I. Introduction

Plaintiff Andreas Plonka filed suit pro se pursuant to 42 U.S.C. 1983, against the 12 above named defendants relating to incidents which occurred in Otsego and Delaware counties. The court has previously provided plaintiff several opportunities to amend his complaint to state a complaint upon which relief could be granted. By decision and order dated November 27,2002, the court dismissed the complaint as to defendants Laraway, Schaeffer, Kramer, Skrobanski, Lawrence Brown and Getman.

In a decision and order dated July 15, 2002, the court dismissed all claims relating to events prior to March 10,1997. Defendant Richard Brown now moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) (2) and 12(b) (4) for failure to timely serve the complaint.1. Defendant Gouldin moves pursuant to Fed. R. Civ. P. 56 for summary judgment on the complaint against him. Defendants Clark and Sastra move pursuant to Fed. R. Civ. P. 12(b)(6) or alternitively Fed. R. Civ. P. 56 to dismiss third amended complaint against them. Defendat Edwards moves pursuant to Fed. R. Civ. P. 12 (b)(6) to dismiss the complaint against him. Plaintiff opposes each of these motions. The court will address them in turn.

Defendant Brown- failure to serve and absolute immunity:

Although defendant Brown's Notice of Motion indicates that the motion is brought pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(4), Brown submits a Memorandum of Law that deals soley with Fed. R. Civ. P. 41(b). Rule 41(b) allows a court to dismiss an action where plaintiff has failed to diligently prosecute an action or where plaintiff fails to comply with a court order.

Brown argues that plaintiff's failure to serve third amended complaint on him when it was filed with this court constitutes a failure to obey the court's prior order and should result in dismissal of plaintiff's action.

1. Defendant Getman also moves on this basis. The court has, however already dimissed defendant getman from the action.

- This argument ignores that plaintiff had previously been instructed not to serve his complaints until they had been reviewed by this court. This rule was instituted to ease the burden on defendants to this action by allowing the court to review the complaint prior to its service. In addition, plaintiff's complaint was served in accordance with this court's November 27, 2002 order. Consequently, Brown's motion on this basis is denied.

The court notes, however, that Brown was acting in his capacity as district attorney during all of the events in question. None of the events in question relate to Brown in his investigatory capacity, rather, plaintiff complains of Brown's decision to prosecute him, Brown's activities in court, and Brown's role in his plea bargain. The second circuit hasdetermined that plea bargaining and deciding whether or not to prosecute are quasi-judicial activities entitled to absolute immunity. See Schloss v. Bouse 876 F. 2d 287, 289-90 (2d Cir. 1989). Because Brown was acting in his role as District Attorney during all of the events in question, he is entitled to absolute immunity. The complaint against him is dismissed.

III. Clark, Sastra and Decker-Absolute Immunity

Defendants Clark and Sastra move to dismiss the complaint against them on the basis that they are absolutely immune from suit.

Judicial officers are entitled to absolute immunity from damages in § 1983 claims for acts taken in their judicial capacity. Maestri v. Jutkofsky, 860 F.2d 50,52 (2nd Cir. 1988), cert. denied 489 U.S. 1016 (1989); Tucker v. Outwater, 118 F.3d 930,932 (2nd Cir.1997); Montero v. Travis, 171 F.3d 757,760 (2nd Cir. 1999). Claims that a judicial act was done in error, done maliciously, or was in excess of authority will not defeat immunity. Tucker, 118 F.3d at 933 (quoting Stump v. Sparkman, 435 U.S. 349, 356-57 (1978).

The actions plaintiff complains of here, namely setting bail and presiding over a case, were clearly taken in the judicial capacity of Clark and Sastra. See Tucker, 118 F.3d at 933(arraignment, setting bail, issuing warrants are judicial activities). The only exception to absolute immunity is when a judge acts in the "clear absence of all jurisdiction." Id. at 934 (quoting Stump, 435 U.S. at 356-357; Bradley v. Fisher, 80 U.S. 335,351 (1972)).

In determining whether there is a clear absence of jurisdiction, the court applies a two part test. Maestri, 860 F.2d at 53. The first prong of the test is an objective standard. An action is taken in the clear absence of jurisdiction where " no reasonable judge would have thought jurisdiction was proper".Tucker, 118 F. 3d at 936 (quoting Maestri, 860 F.2d at 53).

Thus, where a judge is " authorized by law to hear the kind of case in which he acted," immunity will apply, and the court need not consider the second part of the test.

Tucker, 118 F.3d at 937 (quoting Lopez v. Vanderwater, 629 F.2d 1229, 1234 (7th Cir. 1980). In applying this test, a judge's jurisdiction is to be broadly construed. Maestri, 860 F. 2d at 53 (quoting Stump, 435 U.S. at 356). Clark and Sastra were both authorized to hear the kinds of cases they heard-namely, plaintiff's criminal case. There are no allegations, either in plaintiff's complaint or his motion papers that these judges acted outside their jurisdiction.

Rather, plaintiff complains of personal bias against him. These allegations are insufficient to defeat immunity. Consequently, the complaint as to Clark and Sastra must be dismissed. The court notes that defendant Decker is in the same position as Clark and Sastra.

The allegations against Decker relate to setting of bail, compl. P.7 and 8; his failure to warn plaintiff of the collaterl consequences of a guilty plea, compl. P. 11 and 13; refusing to dismiss certain charges against the plaintiff, compl. P. 20 & 21. Moreover, plaintiff does not assert that Decker was without jurisdiction to determine his bail, to determine the procedure for taking his plea and to determine what charges could be pursued.

Consequently, defendant Decker is also entitled to absolute immunity and the complaint against him is dismissed.

IV. Edwards-Qualified Immunity

The only allegation against defendant Edwards is that he failed to give plaintiff his Miranda warnings after plaintiff was arrested in 1999. See compl. P. 5. Defendant Edwards contends that even if he failed to give plaintiff his Miranda warnings, he is entitled to have the complaint against him dismissed on the basis of qualified immunity.

In determining whether qualified immunity applies, the court must first consider whether "a constitutional right would have been violated on the facts alleged." Saucier v. Katz, 533 U.S. 194, 199 (2001). If the court finds that a constitutional right was violated, the court must consider whether a reasonable officer could have believed his conduct was lawful. See Saucier, 533 U.S. at 199; Cerrone v. Brown, 246 F. 3d 194, 202 (2nd Cir. 2001)

The second circuit has phrased this inquiry as a dtermination of " whether it was objectively reasonable for a defendant to think that the challenged conduct did not violate the plaintiff's clearly established rights." Vega v. Miller, 273 F. 3d 460, 466 (2nd Cir. 2001). Thus, if a reasonable officer in Edwards' position could disagree as to whether Edwards' actions were lawful, he is entitled to qualified immunity.

See Cerrone, 246 F. 3d at 202 (defendant is entitled to summary judgment on qualified immunity if " officers of reasonable competence could disagree on the legality of the defendant's actions ") (internal citations omitted.). Edwards has pointed to two second circuit decisions from 1996 and 1998 that stand for the proposition that a failure to give Miranda warnings is

not actionable under 42 U.S.C. 1983. See Neighbor v. Covert, 68 F.3d 1508, 1510 cert. denied, 516 U.S. 1174 (1996) and Deshawn v. Safir, 156 F.3d 340, 346 (2nd Cir. 1998). Based on these cases, Edwards argues that, even assuming he did not give plaintiff his Mirnda warnings, he could not have known that he was violating the plaintiff's clearly established constitutional right.

Indeed, in a case decided this year, the second circuit reiterated its prior holding that a failure to give Miranda warnings alone does not give rise to an action under 42 U.S.C- 1983. See Jocks v. Taverier, 3176 F. 3d 1288, 138 (2nd Cir. 2003) (Miranda violations, absent coercion, do not rise to the level of constitutional violations actionable under § 1983.

The appropriate remedy for violations of Miranda rights is the exclusion of the evidence at trial.") (citing Deshawn, 156 F. 3d at 346). Consequently, plaintiff#s complaint against Edwards fails to state a claim, and Edwards could not have known that he was violating plaintiff's constitutional right to receive Miranda warnings.

V. Gouldin-Malpractice

The allegations in the complaint against Gouldin are that he failed to advise plaintiff of the collateral consequences of his conviction, compl. P. 12, and failed to advise plaintiff to file an appeal within ten days of the conviction, compl. P. 14. As an initial matter, defendant Gouldin is a private citizen. Section 1983 does not permit suits against private individuals.

See Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 939 (1982); American Manfs. Mut. Ins. Co. v. Sullivan , 526 U.S. 40, 50 (1999). Consequently, any constitutional claims against defendant Gouldin are dismissed.

Plaintiff contends, however, that his complaint also states a claim for malpractice against Gouldin. " To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense." Carmel v. Lunney, 70 N.Y. 2d 169, 173-74 (N.Y. 1987).

If he can not do so, " public policy prevents a malpractice action against his attorney." Hoffenberg v. Meyers, 2002 WL 57252, *3 (S. D. N. Y. Jan. 16, 2002) (citing B.K. Indus., Inc. v. Pinks, 533 N.Y.S. 2d 595 (2nd Dept. 1988). In other words, plaintiff must show that " a proper defense would have altered the result of the prior action."

Wilson v. City of New York, 294 A.D. 2d 290, 293 (1st Dep't 2002) (citing Carmel v. Lunney, 70 N.Y. 2d at 173). Plaintiff does not assert that he is innocent of the underlying charges, rather plaintiff challenges his attorney's conduct on the basis of his attorney's failure to advise him of collateral consequences of his conviction. Plaintiff does not, however, put forward any evidence that the outcome of his criminal case would have been any different had he been advised to file an appealor been advised of the collateral consequences of his conviction.

Consequently, plainmtiff may not maintain a malpractice action against attorney Gouldin.

VII. Conclusion

Based on this court's November 15, 2002 decision and order, the action against defendants Laraway, Schaeffer, Kramer, Lawrence Brown and Micheal Getman is dismissed for failure to allege any personal involvement.

The action against defendants Clark, Sastra, and Decler is dismissed on the basis of absolute immunity. The action against defendant Richard Brown is dismissed on the basis of absolute prosecutorial immunity.

The action against defendant Edwards is dismissed on the basis of qualified immunity. Defendant Gouldin's motion for summmary judgment is granted. Because of the court's determinations, there are no defendants left in this action. The case is dismissed. The clerk is directed to close the file.

IT IS SO ORDERED
July 2, 2003

"s/ Thomas J. McAvoy"
Hon. Thomas J. McAvoy
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Judgment in Civil Case
Case No. 3:00-CV-0376

Andreas Plonka

Vs.

Richard Brown, et al

----- Jury Verdict. This action came before this court for a trial by jury. The issues have been tried and the jury has rendered a verdict.
XX Decision by Court. This action came to trial hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the action is dismissed against defendants Laraway, Schaeffer, Kramer, Lawrence Brown, and Micheal Getman for failure to allege any personal involvement.

Pursuant to judge McAvoy's decision and order dated November 15, 2002.

IT IS FURTHER ORDERED that defendants Clark, Sastra and Decker are dismissed on the basis of absolute judicial immunity.
IT IS FURTHER ORDERED that defendant Richard Brown is dismissed on the basis of absolute prosecutorial immunity.
IT IS FURTHER ORDERED that defendant Edwards is dimissed on the basis of qualified immunity.
IT IS FURTHER ORDERED that defendant Gouldin's motion for summary judgment is granted

All in accordance with Judge McAvoy's decision and order filed on July 2, 2003.

Dated: July 2, 2003

Lawrence K. Baerman
Clerk of The Court
"s/ A. Topa"
By Deputy Clerk

(2)

3 0 2004

No. 04-749

IN THE

Supreme Court of the United States

ANDREAS PLONKA,

Petitioner,

-v-

RICHARD BROWN, DONALD LAWAWAY, STEVE CLARK, KAREN SASTRA, FRANK SCHAEFFER, RONALD DECKER, GERALD KRAMER, ANDREW SKROBANSKI, DEAN EDWARDS, LAWRENCE BROWN, ROBERT GOULDIN and MICHAEL GETMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED AS TO RESPONDENT GOULDIN

DID THE PETITIONER STATE A CAUSE OF ACTION FOR LEGAL MALPRACTICE AGAINST RESPONDENT GOULDIN, GIVEN THAT PETITIONER'S GUILTY PLEA TO CRIMINAL CHARGES PREVENTS HIM FROM ESTABLISHING A COLORABLE CLAIM OF INNOCENCE OF THE UNDERLYING OFFENSE?

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PRELIMINARY STATEMENT

Pursuant to Rule 15 of the Rules of the Supreme Court, this Brief in opposition is submitted on behalf of respondent Robert Gouldin, requesting that this Court deny petitioner Andreas Planka's application for Writ of Certiorari. Petitioner commenced this action in United States District Court for the Northern District of New York on February 4, 2002, alleging a number of constitutional violations and tort claims against both public officers and private citizens.

Respondent Robert Gouldin, a private citizen, provided legal representation to petitioner Planka in criminal proceedings in Otsego County, New York. Petitioners constitutional claims against respondent Gouldin were analyzed as legal malpractice claims by the District Court in respondent's motion to dismiss. The motion to dismiss was granted by Decision and Order dated July 2, 2003. The dismissal was affirmed by the Second Circuit of Appeals by Decision dated September 2, 2004.

STATEMENT OF FACTS

Respondent Robert Gouldin is a duly licensed and practicing attorney in the State of New York, with an office at 93 Main Street, Oneonta, New York. Petitioner Andreas Plonka hired Mr. Gouldin to represent him with regard to a number of criminal charges after prior counsel withdrew from petitioner's representation. The charges including four counts of second degree harassment, three counts of second degree criminal contempt, one count of second degree menacing, and a charge of bail jumping.

The appellant's previous counsel attempted to negotiate a plea bargain, but the prosecution's best offer involved one year of jail time. After taking over the case, respondent Gouldin negotiated a guilty plea that involved no incarceration. The appellant agreed to the plea bargain and was willing to admit guilt as long as he received only a financial sanction, contrary to his current claims that he was coerced into a negotiated disposition. Petitioner in fact received only a financial sanction, but was also subject to deportation proceedings with the U.S. Immigration and Naturalization Service based upon his conduct.

ARGUMENT

THE COURTS BELOW PROPERLY DISMISSED PETITIONER'S ACTION AGAINST RESPONDENT GOULDIN, AND PETITIONER RAISES NO GROUNDS FOR CERTIORARI HEREIN.

In his Petition for Certiorari, the petitioner frames the question presented for review as to respondent Gouldin as one of whether criminal defense attorneys should be "shielded" from malpractice suits if petitioner can show that he was deliberately misled and that the Court was made up of individuals who did not like him. Petitioner's original claim against respondent Gouldin was for constitutional violations. The Court analyzed this as a malpractice claim, since there is no basis for a civil rights action against a private individual under these facts.

As a State tort claim, any malpractice allegation by the petitioner was properly analyzed under New York law. The New York State Court of Appeals has held that a plaintiff fails to state a cause of action in legal malpractice if a determination of guilt on the underlying criminal offense remains unchallenged. *Carmel v. Lunney,* 70 N.Y.2d 169, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (1987). The *Carmel* Court held that a defendant who stands convicted upon a guilty plea cannot establish that any alleged malpractice was the cause of an injury:

> "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense, for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie." *Supra* at 607.

The Court of Appeals more recently re-examined this principle and restated the rule in *Britt v. Legal Aid Society, Inc.*, 95 N.Y.2d 443, 741 N.E.2d 109, 718 N.Y.S.2d 264 (2000). The Court there stated:

> "To open the door for even a colorable claim of innocence, criminal defendants must free themselves of the conviction, for the conviction precludes those potential plaintiffs from asserting innocence in a civil suit." *Supra* at p. 446.

The petitioner herein has not set aside the criminal conviction. The petitioner chose to plead guilty to numerous charges against him in the hope of avoiding jail time. This result was accomplished, and the guilty plea remains undisturbed. It follows that he cannot establish that he would have been successful in a trial in the underlying criminal proceeding, nor can he establish that his conviction was due solely to his attorney's actions.

The petitioner also claims that respondent Gouldin is liable for failing to inform him of the immigration consequences of his conviction. Respondent Gouldin was hired to represent the plaintiff in a criminal proceeding, and not in any immigration law matters. The New York Court of Appeals has held that a criminal defense attorney need not advise a defendant of the possibility of deportation, because it is a collateral consequence outside the control of the Court. See *People v. Ford*, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995).

It has also been held that federal constitutional rights to effective assistance of counsel are not violated merely because the criminal attorney fails to advise a defendant of the possibility of deportation. *United States v. Delarosario*, 902 F.2d 55 (D.C. Circuit, 1990), cert denied 498 U.S. 942, 111 S.Ct. 352, 112

L.Ed. 316 (1990). The "failure to advise a defendant of the possibility of deportation does not affect the voluntariness of the guilty plea or require vacating the plea." *People v. McDonald*, 296 A.D.2d 13, 745 N.Y.S.2d 276 (3rd Dept., 2002), affirmed 1 N.Y.3d 109, 802 N.E.2d 131, 769 N.Y.S.2d 781 (2003).

Like a defendant whose criminal conviction is not overturned based upon an attorney's alleged failure to advise of consequences unrelated to the criminal prosecution, the petitioner herein, whose conviction has not been overturned, may not assert a malpractice claim against the attorney representing him at the time of his guilty plea.

CONCLUSION

The District Court properly dismissed the petitioner's Complaint herein, and the dismissal was properly affirmed by the Second Circuit Court of Appeals. The petitioner has raised no novel issues making his case appropriate for this Court's review, and his petition should be denied.

Dated: December 29, 2004
Vestal, New York

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IN THE

Supreme Court of the United States

ANDREAS PLONKA,

Petitioner,

—v.—

RICHARD BROWN, DONALD LARAWAY, STEVE CLARK, KAREN SASTRA, FRANK SCHAEFFER, RONALD DECKER, GERALD KRAMER, ANDREW SKROBANSKI, DEAN EDWARDS, LAWRENCE BROWN, ROBERT GOULDIN and MICHAEL GETMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW
Pertaining to Respondents Getman and Richard Brown

Upon proof and a record that Respondents Getman and Richard Brown were at all times prosecuting Petitioner Plonka as Assistant District Attorneys, are their quasi-judicial activities entitled to absolute immunity ?

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AUTHORITIES

"Where a plaintiff seeks damages against a district attorney's office and assistant district attorneys in their official capacity for specific actions related to the plaintiff's prosecution, the Eleventh Amendment to the United States Constitution shields them from liability."

U.S.C.A. Const. Amend. 11.

"To state a Section 1983 claim, a plaintiff must allege that: (1) the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States."

42 U.S.C.A. §§ 1983.

It is well established that "prosecutors are entitled to absolute immunity from suits for damages arising from activities that are 'intimately associated with the judicial phase of the criminal process."

Carson v. Rivers, 35 F. Supp.2d 250, 262 (E.D.N.Y.1999) (quoting Barbera v. Smith, 836 F.2d 96, 99 (2d. Cir.1987)).

ARGUMENT

Respondents Getman and Richard Brown answered the pro se suit filed by Petitioner. Respondents Getman and Richard Brown at all times prosecuted Petitioner in their roles as Assistant District Attorneys for the County of Otsego, State of New York.

These Respondents interposed defenses, including qualified and absolute immunity by reason of their quasi-judicial activities in prosecuting Petitioner.

This Petition should be dismissed for the following reasons:

1. The United States Court of Appeals Second Circuit did not render this Decision in conflict with the decision of any other United States Court of Appeals.

2. No state court of last resort decided an important federal question in a way that conflicts with the Decision herein.

3. The application of the rule of absolute immunity has been decided by this Court, and need not be revisited in this case.

CONCLUSION

For all reasons stated in this Brief in Opposition, Respondents Michael Getman and Richard Brown seek dismissal of the Petition.

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